

UNITED STATES DISTRICT COURT

## DISTRICT OF OREGON

## PORTLAND DIVISION

DIANA KRIEG,

Plaintiff,

No. 03:10-cv-00950-HU

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

## FINDINGS AND RECOMMENDATION ON MOTION FOR 406(B) FEES

Defendant.

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Attorneys for Defendant

1 HUBEL, United States Magistrate Judge:

2       The plaintiff Diana Krieg brought this action for judicial  
3 review of the Commissioner's decision to deny her applications for  
4 disability insurance benefits under Title II of the Social Security  
5 Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental Security Income  
6 under Title XVI of the Act. In Findings and Recommendation entered  
7 October 31, 2011, I recommended that the Commissioner's decision be  
8 reversed and the case be remanded for payment of benefits. Dkt.  
9 #16. Neither party filed objections, and on January 4, 2012, Judge  
10 Michael H. Simon accepted my recommendation and entered judgment  
11 for Krieg. Dkt. ##19 & 20.

12       The parties stipulated to a fee payment under the Equal Access  
13 to Justice Act, 28 U.S.C. § 2412 (EAJA), in the amount of  
14 \$4,558.78. On April 4, 2012, I recommended Krieg's motion for EAJA  
15 fees be granted, Dkt. #25, and on May 7, 2012, Judge Simon ordered  
16 payment to the plaintiff of EAJA fees in the amount of \$4,558.78.  
17 Dkt. #30.

18       The matter now is before the court on the plaintiff's  
19 unopposed motion for attorneys' fees pursuant to 42 U.S.C.  
20 § 406(b). Dkt. #27. Section 406(b) provides that an attorney who  
21 represents a successful claimant in a Social Security action may be  
22 awarded, as part of the judgment, "'a reasonable fee . . . not in  
23 excess of 25 percent of the . . . past-due benefits' awarded to the  
24 claimant." *Gisbrecht v. Barnhart*, 535 U.S. 789, 795, 122 S. Ct.  
25 1817, 1822, 152 L. Ed. 2d 996 (2002) (quoting 42 U.S.C.  
26 § 406(b)(1)(A)). The attorney's fee "is payable 'out of, and not  
27 in addition to, the amount of [the] past-due benefits.'" *Id.* An  
28 attorney may receive fees under both EAJA and section 406(b), but

1 the attorney must refund the amount of the smaller fee to the  
2 claimant. *Id.* (citation omitted). This ensures the claimant  
3 receives the largest possible award of benefits. *Id.*

4 The *Gisbrecht* Court observed that contingent fee contracts  
5 "are the most common fee arrangement between attorneys and Social  
6 Security claimants." *Id.*, 535 U.S. at 800, 122 S. Ct. at 1824  
7 (citation omitted). To prevent an attorney from contracting for an  
8 unreasonably large fee, Congress enacted section 406(b) to limit  
9 the attorney's fee to 25 percent of the past-due benefits. *Id.*,  
10 535 U.S. at 805, 122 S. Ct. at 1826-27 (discussing the legislative  
11 history behind section 406(b)). However, the statute does not  
12 mandate that an attorney receive 25 percent of the claimant's past-  
13 due benefits. Rather, "[w]ithin the 25 percent boundary, . . . the  
14 attorney for the successful claimant must show that the fee sought  
15 is reasonable for the services rendered." *Id.*, 535 U.S. at 807,  
16 122 S. Ct. at 1828. Thus, although the district court must look  
17 first to the contingent fee agreement between the attorney and the  
18 claimant, the court then must test the fee arrangement for  
19 reasonableness. *Crawford v. Astrue*, 586 F.3d 1142, 1149 (9th Cir.  
20 2009) (citing *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828).

21 The amount of the fee may be reduced "based on the character  
22 of the representation and the results the representative achieved."  
23 *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828 (citations omitted).  
24 Thus, for example, a reduced fee would be in order "if the attorney  
25 provided substandard representation or engaged in dilatory conduct  
26 in order to increase the accrued amount of past-due benefits, or if  
27 the 'benefits are large in comparison to the amount of time counsel  
28 spent on the case.'" *Crawford*, 586 F.3d at 1148 (quoting

1 *Gisbrecht, supra*). The attorney ultimately "bears the burden of  
2 establishing that the fee sought is reasonable." *Id.*

3 Routine rubber-stamping of the statutory maximum allowable fee  
4 is disfavored in these cases. As the Fourth Circuit Court of  
5 Appeals observed over forty years ago,

6 [J]udges should constantly remind themselves  
7 that, while the lawyer is entitled to a  
8 reasonable compensation for the services  
9 rendered by him in the judicial proceeding,  
10 these benefits are provided for the support  
11 and maintenance of the claimant and his [or  
12 her] dependents and not for the enrichment of  
13 members of the bar. Routine approval of the  
14 statutory maximum allowable fee should be  
15 avoided in all cases. In a great majority of  
16 the cases, perhaps, a reasonable fee will be  
17 much less than the statutory maximum. The  
18 statute directs a determination and allowance  
19 of a reasonable fee and the courts are  
20 responsible under the [Social Security] Act  
21 for seeing that unreasonably large fees in  
22 these Social Security cases are not charged or  
23 collected by lawyers.

24 *Redden v. Celebrezze*, 370 F.2d 373, 376 (4th Cir. 1966)

25 In the present case, the fee agreement between the plaintiff  
26 and her counsel provides for a fee equal to 25 percent of past-due  
27 benefits. See Dkt. #28-2. Counsels' efforts resulted in an award  
28 of "at least \$56,873.00 in retroactive benefits, plus ongoing  
benefits and medical insurance coverage." Dkt. #28, pp. 7-8.  
Thus, the contracted-for attorney's fee would be \$14,218.25 - the  
amount sought in the present motion. After deduction/refund of the  
\$4,558.78 fee awarded under EAJA, the requested fee would result in  
an out-of-pocket amount for Krieg of \$9,659.47. The court  
previously determined that the number of hours expended by Krieg's  
counsel in the case (25.35 hours) was a "reasonable amount of time  
to spend on a social security case that does not present particular

1 difficulty." *Harden v. Comm'r*, 497 F. Supp. 2d 1214, 1215 (D. Or.  
2 2007) (Mosman, J.). A fee of \$14,218.25 for 25.35 hours of work  
3 would result in an effective hourly rate of \$560.88. Counsel  
4 states that although he "does not have a set hourly rate for  
5 representing disability claimants in court," which "would be  
6 illegal," he charges \$375.00 per hour to serve "as a consultant in  
7 SSD/SSI disability matters." Dkt. #28, p. 4 n.3. Thus, the *de*  
8 *facto* fee requested in this case is \$185.88 per hour higher than  
9 counsel's usual hourly rate in these types of cases.

10 The court recognizes that the *de facto* hourly rates in Social  
11 Security cases typically exceed the rates in non-contingency-fee  
12 cases. *See, e.g., Daniel v. Astrue*, 2009 WL 1941632, at \*2 (C.D.  
13 Cal. July 2, 2009) (citing cases from numerous jurisdictions  
14 approving fee awards equivalent to hourly rates ranging from \$350  
15 per hour to \$982 per hour). Indeed, the effective rate requested  
16 in this case is significantly lower than the effective hourly rates  
17 approved for services provided by Krieg's counsel in other similar  
18 cases in this court. *See, e.g., Breedlove v. Astrue*, No. 03:07-cv-  
19 01743-AC (D. Or. June 24, 2011) (Brown, J.) (awarding \$24,587.50,  
20 equivalent to \$1,041.84 per hour, in case involving stipulated  
21 remand following plaintiff's 20-page brief); *Lynch v. Commissioner*,  
22 *Soc. Sec. Admin.*, No. 03:09-cv-00871-JE (D. Or. May 31, 2011)  
23 (Jelderks, M.J.) (awarding \$32,913.25, equivalent to \$937.70 per  
24 hour, in case involving findings and recommendation, with objec-  
25 tions thereto); *Robertson v. Commission of Soc. Sec.*, No. 03:07-cv-  
26 1428-HO (D. Or. June 22, 2010) (Hogan, J.) (awarding 28,294.13,  
27 equivalent to \$702.96 per hour, in case involving ordinary  
28 briefing); *Harris v. Commissioner, Soc. Sec. Admin.* No. 03:06-cv-

1 1256 (D. Or. July 15, 2009) (Marsh, J.) (awarding 35,824.22,  
 2 equivalent to \$768.76 per hour, in case involving ordinary  
 3 briefing). See also, e.g., (cases involving other attorneys)  
 4 *Carver v. Astrue*, No. 03:08-cv-6099-MO (D. Or. Oct. 6, 2010)  
 5 (Mosman, J.) (awarding \$19,438.61, equivalent to \$910.82 per hour,  
 6 in case involving ordinary briefing); *Wright v. Commissioner, Soc.*  
 7 *Sec.*, No. 03:07-cv-00047-ST (D. Or. Oct. 7, 2008) (Brown, J.)  
 8 (awarding 25,368.24, equivalent to \$800.26 per hour, in case  
 9 involving unopposed findings and recommendation).

10 However, the court previously has rejected the approach of  
 11 comparing fees awarded in other cases because the approach bears  
 12 "no relationship to the amount of work reasonably necessary to  
 13 achieve the result, nor to the *Crawford* analysis." *Baugh v.*  
 14 *Astrue*, No. 03:08-cv-1237-HU, Dkt. #28, p. 18 (D. Or. Sept. 12,  
 15 2011) (Hubel, M.J.).

16 Applying the *Gisbrecht* factors to the requested fee in this  
 17 case, the performance of Krieg's counsel in this case was not  
 18 substandard, nor did counsel "engage[] in dilatory conduct in order  
 19 to increase the accrued amount of past-due benefits[.]" *Crawford*,  
 20 586 F.3d at 1148 (citing *Gisbrecht*). Counsel was effective in  
 21 winning benefits for Krieg. To do so, he was required to review  
 22 the 321-page administrative record, brief and argue the legal  
 23 issues in favor of overturning the Commissioner's decision, and  
 24 respond to the Commissioner's argument that his decision should be  
 25 upheld. However, the Commissioner did not object to my findings  
 26 and recommendation that the case should be remanded for further  
 27 consideration, so counsel did not have to respond to any  
 28 objections. Further, the issues presented in the case were not

1 particularly difficult or technical, and counsel acknowledges that  
2 "this case was about an average risk case." Dkt. #28, p. 3.  
3 Nevertheless, counsel argues this case involved "a high risk of  
4 loss and non-payment," noting even cases that proceed without any  
5 delay take two years or more from the time counsel accepts the case  
6 until payment of fees under section 406(b) finally takes place.  
7 *Id.*, p. 3. & n.2 (emphasis added). In the present case, counsel  
8 asserts that he performed most of the work in the case "months  
9 ago," arguing the "significant delay in payment warrants an  
10 increase in what otherwise would be a reasonable fee." *Id.*, p. 9  
11 (emphasis in original). Counsel argues no reduction should be made  
12 in the requested fee in recognition of the fact that "'attorneys  
13 whose compensation depends on their winning the case, must make up  
14 in compensation in the cases they win for the lack of compensation  
15 in the cases they lose.'" *Id.*, p. 7 (quoting *In re Wash. Public*  
16 *Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300-01 (9th Cir.  
17 1994), in turn citing *Skelton v. Gen. Motors Corp.*, 860 F.2d 250,  
18 254 (7th Cir. 1988)). However, counsel's burden "is to show that  
19 the fee is reasonable based on the facts of the particular case,"  
20 rather than looking at the risk of recovery in all contingency fee  
21 cases generally, or even all Social Security cases. See *Crawford*,  
22 586 F.3d at 1153.

23 The court has an "affirmative duty" to assure the reasonable-  
24 ness of fee awards under section 406(b). *Crawford*, 586 F.3d at  
25 1149. I have considered the *Gisbrecht* factors carefully, and find  
26 counsel has failed to meet his burden to show the fee is reasonable  
27 based on the facts of this case. See *Crawford*, 586 F.3d at 1153.  
28 Based on the above discussion, and my experience in these types of

1 cases in general, and this case in particular, I find that a 20%  
2 reduction in the fee is warranted. Accordingly, I recommend the  
3 plaintiff's motion be **granted in part and denied in part**, and her  
4 counsel be awarded **\$11,375.00** in fees under section 406(b), an  
5 award of \$448.72 per hour, less the \$4,558.78 already awarded under  
6 EAJA. This award still exceeds counsel's usual Social Security  
7 consultation fee.

8  
9 ***Scheduling Order***

10 These Findings and Recommendation will be referred to a  
11 district judge. Objections, if any, are due **June 18, 2012**. If no  
12 objections are filed, then the Findings and Recommendation will go  
13 under advisement on that date. If objections are filed, then a  
14 response is due by **July 5, 2012**. When the response is due or  
15 filed, whichever date is earlier, the Findings and Recommendation  
16 will go under advisement.

17 IT IS SO ORDERED.

18 Dated this 30th day of May, 2012.

19  
20 /s/ Dennis James Hubel  
21 Dennis James Hubel  
22 Unites States Magistrate Judge  
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